No. 13444

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PAPPAS AND COMPANY, AND FRESH FRUIT AND VEGETABLE WORKERS UNION, LOCAL 78, AND FOOD, TOBACCO, AGRICULTURAL AND ALLIED WORKERS UNION OF AMERICA, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board for enforcement of its order issued on June 15, 1951, against respondents, hereinafter called the Company and the Union, respectively, pursuant to Section 10 (c) of the National Labor Relations Act, as amended.[1] The Board's

[1] 61 Stat. 136, 29 U. S. C., Supp. V, Secs. 151 *et seq.*, hereinafter called the Act. Relevant portions of the Act appear in the Appendix, *infra*, pp. 20–24.

decision and order (R. 21–39) are reported in 94 NLRB 1195. This Court has jurisdiction under Section 10 (e) of the Act, the unfair labor practices having occurred within this judicial circuit at the Company's place of business in Mendota, California.

STATEMENT OF THE CASE

I. The dismissal of employee Ramey for his failure to pay dues to the Union

The facts of this case pertain to the dismissal of Virgil Ramey from his employment at the Company's packing shed in Mendota, California, where it is engaged in the sorting and crating of melons for shipment to market (R. 41–42; 72–74).[2] In brief, the Board found that the Union engaged in a work stoppage for the purpose of securing Employee Virgil Ramey's discharge because he was delinquent in the payment of dues to the Union. The Company, in turn, was found to have acquiesced in the Union's demand, and to have effected Ramey's discharge. Inasmuch as there was not in effect a union-security agreement immunizing such conduct, the Board found (R. 22–27) that the Union thereby violated Sections 8 (b) (2) and 8 (b) (1) (A) of the Act, and the Company violated Sections 8 (a) (3) and 8 (a) (1). The subsidiary facts upon which these findings rest may be summarized as follows:

T. H. Hamilton, the Company's foreman at its packing shed, had made arrangements with Virgil

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[2] A substantial amount of its products is shipped by the Company to points outside the State of California (R. 42; 83). The Board's jurisdiction is not challenged.

Ramey that the latter should start work at the packing shed when the crating and shipping of Persian melons began sometime in the middle of August, 1950 (R. 121, 122). However, on August 2, before work began on Persian melons, Foreman Hamilton told Ramey that he could report to work immediately to replace another employee, James Yokas, a Union member, who had been discharged for failure to unload melons properly (R. 23; 85, 120–121, 126). Within a day or two after Ramey began work, two business agents of the Union, Chuck Feller and Duke Cunningham, protested to Foreman Hamilton against Ramey's employment because the latter "was not a union member" and asked why Hamilton "didn't get rid of him" (R. 113). No agreement between the Company and the Union conditioning employment on union membership was then in effect, the statutory prerequisites not having been met (R. 47–48; 125).[3] Accordingly, Hamilton refused the demand of Union agents Cunningham and Feller and the conversation ended (R. 113).

On the following days, August 4 and 5, Cunningham and Feller separately approached Ramey on two oc-

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[3] At the time of the events in this case, Section 8 (a) (3) of the Act, in a provision subsequently deleted (65 Stat. 601), required a referendum to be conducted among the employees as a prerequisite to a union security agreement. Section 8 (a) (3) provided also, then as now, that even where such an agreement is properly authorized and executed, it is not applicable to an employee until thirty days after the beginning of his employment or the effective date of the agreement whichever is the later. Here, the prerequisite referendum had not been held and the thirty-day period had not elapsed (R. 47–48; 120, 125).

casions while he was working and asked to see his Union dues book (R. 43; 87–89). Ramey, who was in fact a member of the Union but who was six months delinquent in his dues, told them that he did not have his book with him (R. 43; 86–89). On the afternoon of August 5, Business Agent Feller returned to Ramey and urged him to pay his arrearages, but Ramey expressed a preference for a different union which was affiliated with the CIO, and stated that he would not make any payments until a Board election had been held (R. 43; 89–90). Feller then left Ramey and went to Foreman Hamilton to ask again "if [he] wouldn't get rid of this Ramey" (R. 23; 114). When Hamilton refused, Feller told him that the Union was "going to insist on a closed shop" (R. 114), and immediately thereafter called a work stoppage by the Union members in the packing shed (R. 23; 115). All machinery was shut off and production came to a full stop (R. 43; 90, 115).

As soon as the work stoppage had been made complete, Business Agents Cunningham and Feller approached Foreman Hamilton and George Pappas, who was president of the Company and was in the packing shed at the time, and demanded that they discharge Ramey "and put * * * a union man back to work in his place" (R. 23; 115). At the same time they insisted that "it is going to be a closed shop from here on out" (R. 115). A few minutes later Employee Ramey came to the packing shed, and on seeing him, Business Agent Feller stated, "Well this is the reason we called this shutdown—there is

a man working outside that don't even belong to the union" (R. 43–44; 90–91, 115–116). Ramey, learning that he was the man referred to, protested that he did belong to the Union, and a discussion about payment of his dues ensued (R. 44; 91, 108–109, 116). Business Agent Cunningham offered to call off the work stoppage if Ramey would post a year's dues pending an investigation of Ramey's Union status, but Ramey refused to pay the money (R. 23, 44; 92, 109, 116). Finally, after conferring with President Pappas, Hamilton told Ramey that "the boys refuse to go back to work until you are off the shed, so you might as well take off * * *. I will go ahead and pay you for the rest of the day [Saturday] * * *. I hope something will develop and you will go back to work over the weekend" (R. 23–24, 44; 93, 117). Hamilton promised that he "would try to get hold of Duke [Cunningham] and Chuck [Feller] and try to see if he couldn't get them to let him [Ramey] to go back to work" (R. 117). Ramey then left the packing shed and production was resumed (R. 24; 117). Shortly thereafter, President Pappas asked the Union steward of the packing shed, Herschel Crow, "if everything is settled" (Tr. 111). Crow replied that "it looks like it is" to which Pappas responded "that is all right, we don't want the fellow anyway, he is a trouble maker" (*id.*).

On the following day, Sunday, Foreman Hamilton saw Business Agent Feller in Mendota, and asked him why he wouldn't permit Ramey to return to work (R. 117–118). Feller replied that Ramey "just

is not a union member, and they just don't want him" (*id.*). Following this conversation Hamilton approached James Yokas, the employee whose position Ramey had taken upon the former's discharge, and told him that he could have Ramey's job (R. 24, 121, 123). In bringing Yokas, who was a Union member, back to work, Hamilton believed that "this whole thing would be settled and maybe they [the Union] would let Ramey go back and work * * * when the Persians [melons] started" (R. 24; 123). As a final step to settle the difficulty, Hamilton visited Ramey that evening and urged him to pay his Union dues, explaining that "That way you can come back and go to work" (R. 24; 95). Ramey, however, adamantly refused to make any payment of dues to the Union (R. 24; 95).

The next morning Ramey, who considered that he had been discharged (R. 101), appeared at the packing shed, accompanied by two CIO representatives, in the hope that Hamilton would put him back to work (R. 24; 95–96, 101, 119). The other employees saw Ramey, and, led by the Union shop steward, Herschel Crow, stopped their preparations to begin the morning's work, "took their aprons off and stood up in a bunch" (R. 24; 97, 119). Hamilton, observing the Union demonstration, told Ramey, "Well, the boys refuse to work while you are around the shed" (R. 24; 97). Thereupon, Ramey replied, "I am getting off. I don't want to cause any trouble" (R. 25; 97). Ramey left the packing shed, but the employees returned to their jobs only after Hamilton,

at shop steward Crow's request, asked the two CIO representatives to leave also (R. 119). Thereafter, Ramey returned to the packing shed twice: once to pick up his paycheck (R. 97), and another time to see whether Hamilton had recognized "his mistake" in firing Ramey and would "give [Ramey] a chance to go back to work" (R. 95, 99–101). However, Ramey was not reinstated (R. 97).

II. The Board Conclusions and Order

Upon the foregoing facts the Board, like the Trial Examiner, concluded that the Union, by engaging in a work stoppage on August 5, 1951, for the purpose of forcing the Company to discharge employee Ramey because of the latter's delinquency in dues at a time when no union-security agreement was in effect, violated Sections 8 (b) (2) and 8 (b) (1) (A) of the Act (R. 48). The Board concluded also that the Company, by laying off Ramey on August 5 in accordance with the Union demand and by refusing to reinstate him when he appeared for work the following work day, violated Sections 8 (a) (3) and 8 (a) (1) of the Act (R. 25–26). In finding that the Company had also violated the Act, the Board did not accept the Trial Examiner's view that Ramey "had involuntarily relinquished his job * * * not because of any act of the Company but solely because of the conduct of the * * * Union" (R. 23). However, the Board found that, even assuming, *arguendo,* the correctness of the Trial Examiner's interpretation of the facts, his legal conclusion that

the Company was not responsible under the Act for Ramey's loss of employment was untenable. For in the Board's view, the Company, by its silence and inaction when Ramey yielded to the Union's demand on August 7 that he leave the packing shed, acquiesced in the Union's demand and permitted "the termination of Ramey's employment for discriminatory purposes" (R. 27).

The Board's order requires the Company to cease and desist from encouraging membership in the Union and from in any other manner interfering with, restraining and coercing its employees in the exercise of their rights under the Act, and affirmatively directs the Company to offer Employee Ramey reinstatement. The Union is required to cease and desist from causing or attempting to cause the Company to discriminate against its employees and from in any other manner restraining or coercing the Company's employees in the exercise of their rights under the Act, and is affirmatively directed to notify the Company and Employee Ramey that it is withdrawing its objection to Ramey's employment (R. 31–35).

In addition, both the Company and the Union are ordered to post appropriate notices, and jointly and severally to make Employee Ramey whole for any loss of pay he may have suffered as a result of the discrimination against him (R. 35).[4]

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[4] Because the Trial Examiner had not recommended that the Comany reinstate Ramey with back pay, the Board, "in accordance with [its] practice," ruled that "the liability of the Respondent Company for back pay will be tolled with respect to the period from the date of the Intermediate Report to the date of the Order herein" (R. 28).

SUMMARY OF ARGUMENT

The Board's finding that the Union violated Section 8 (b) (2) and (1) (A) of the Act by demanding, and calling a work stoppage to enforce its demand, that Employee Ramey be discharged because of his failure to pay dues and maintain his Union membership in good standing, is supported by substantial evidence on the record considered as a whole.

Similarly, the Board's finding that Foreman Hamilton yielded to the Union's demands and on August 5 permanently laid off Ramey until the latter settled his difficulties with the Union is also supported by substantial evidence on the record considered as a whole. Moreover, if it should be assumed that the Company did not discharge Ramey on August 5, the Company's conduct when the Union forced Ramey to leave the packing shed on August 7 constituted an adoption of the Union's action. Upon either view of the facts of Ramey's loss of employment, the Company committed violations of Section 8 (a) (3) and (1) of the Act.

ARGUMENT

Substantial evidence on the record considered as a whole supports the Board's findings that the Company violated Section 8 (a) (3) and (1) of the Act by effecting employee Ramey's discharge, and that the Union violated Section 8 (b) (2) and (1) (A) of the Act by causing the Company to do so

It cannot be seriously doubted, on the foregoing facts, that the Union's successful attempt to have employee Ramey discharged was prompted by Ramey's

failure to maintain his Union membership in good standing because of his delinquency in the payment of dues.[5] Discrimination in the tenure of employment for the failure to pay dues, however, is permitted by

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[5] During the hearing before the Trial Examiner the Union took the position that its efforts to have Ramey released from his job were not attributable to Ramey's lack of good standing with the Union, but were only an inevitable consequence of its single objective of having the discharge of James Yokas, whom Ramey replaced, rescinded on the grounds that it was not made for good cause (R. 47). The Trial Examiner in his intermediate report rejected this factual contention as unsupported by credible evidence (R. 47–48), and the Union, after being granted two extensions of time in which to file its exceptions to the intermediate report, failed to submit any such exceptions within the period allotted to it (R. 22, 57, 66). Accordingly, the Board adopted the findings and recommendations which the Trial Examiner had made with respect to the Union, and the Union's contention that it did not seek to have Ramey discriminated against because of his delinquency in payment of dues has not been preserved for consideration by this Court. See, N. L. R. B. Rules and Regulations, Series 6, Sec. 102.46 (b); Sections 10 (c) and 10 (e) of the Act; *N. L. R. B.* v. *Cheney California Lumber Co.*, 327 U. S. 385, 389; *Marshall Field & Co.* v. *N. L. R. B.*, 318 U. S. 253, 255; cf. *N. L. R. B.* v. *Noroian Co.*, 193 F. 2d 172 (C. A. 9).

Apart from the failure of the Union to preserve its contention, it is abundantly clear that there is no merit in it. For as we have shown, *supra*, pp. 3–7, Union business agents Cunningham and Feller repeatedly asked Foreman Hamilton to discharge Ramey because of the latter's failure to maintain his membership in good standing, and because the Union intended to enforce closed-shop conditions.

These demands were not in any way made dependent upon the rehiring of Yokas; indeed, as the Trial Examiner found, the Union had conceded that Yokas was justifiably discharged (R. 47, Tr. 90–91). Moreover, if the reinstatement of Yokas was the sole objective of the Union, it would have had no cause to stop work on August 7 to protest Ramey's appearance at the packing shed, for Yokas had then been rehired and was working.

the Act only if a valid agreement which so provide exists between a union and an employer. See provis to Section 8 (a) (3). No contention was made befor the Board, as indeed none could be, that there wa such a contract applicable to Ramey in this case. Fo at the time of Ramey's discharge the Act imposed as a prerequisite to the execution of any contrac which made union membership in good standing condition of employment, the authorization of th employees by means of a referendum procedure (se p. 3, fn. 3, *supra*), and it is conceded that no suc authorization had been obtained in this case (*supr* p. 3). Furthermore, even a valid union-securit agreement could not have affected Ramey's employ ment in the instant case for the Act delays the opera tion of such agreements with respect to new employee for a thirty-day period, and Ramey of course had no been employed that long. Accordingly, the Union' objective in seeking Ramey's discharge entailed th commission by the Company of a violation of Sectio 8 (a) (3) of the Act, which proscribes discharges o the grounds urged by the Union. And in twice initi ating work stoppages in order to implement its suc cessful effort to compel the Company to yield to it demand, it is clear that the Union transgressed th Act's explicit interdiction against "caus[ing] or at tempt[ing] to cause an employer to discriminat against an employee in violation of subsection (a (3)" of Section 8. Section 8 (b) (2) of the Act *Union Starch & Refining Co.* v. *N. L. R. B.*, 186 F 2d 1008 (C. A. 7), certiorari denied, 342 U. S. 815

N. L. R. B. v. *Newman,* 187 F. 2d 488 (C. A. 2), enforcing 85 NLRB 725.

The Board also correctly concluded that the Company's action, in responding to the Union's economic pressure by putting Ramey off the job, constituted a discharge of Ramey in violation of the Act. Thus, when the Union members stopped work on August 5 to protest against the employment of Ramey because he was not in good standing with the Union, Foreman Hamilton yielded to the Union demand and told Ramey that he "might as well take off" (R. 93). As the Board found (R. 25), this lay-off was intended to be permanent unless the Union relented in its position or Ramey paid his arrearages in dues, and was not intended merely to be a paid vacation for the remainder of the day. The correctness of this finding is demonstrated both by the actions and statements of the Company officials responsible for the lay-off. Thus, immediately after Ramey's dismissal, President Pappas remarked that "we don't want the fellow anyway, he is a trouble maker" (Tr. 111). And Foreman Hamilton, after promising that he would try to "get [the Union] to let [Ramey] go back to work" (R. 117), quickly rehired Employee James Yokas to replace Ramey when it became apparent that the Union would not change its demand that Ramey either pay his dues or be discharged (*supra,* p. 6). Significantly, too, Hamilton interviewed Ramey the day following the lay-off, but did not offer to reinstate him unless he paid his Union dues, since "that way you can come back and go to work" (R. 95).

Finally, the circumstances of the August 5 lay-o wherein Hamilton showed that he was willing to sen Ramey home without loss of wages as the price c securing the Union's cooperation in maintaining pr duction (*supra,* p. 4–5), furnish clear evidence tha Hamilton did not want Ramey at the packing she so long as the Union objected to his presence. Rame himself was fully aware that his dismissal was "final as of that time (R. 101). This impression was cor firmed when, on Monday, the following work da Ramey again appeared at the packing shed in orde to give Hamilton an opportunity to reinstate hi (*supra,* p. 6). The Union work stoppage that im mediately ensued signified to Hamilton that there ha been no change in the Union's position. In turn Hamilton's remark to Ramey that "Well, the boy refuse to work while you are around the shed" (R 93), likewise signified to Ramey that there had bee no change in the Company's position, namely, that i would not offer Ramey employment so long as th Union persisted in its demands. And, of course, "an form of words which conveys to the [employee] th idea that his services are not longer required is suf ficient to constitute a discharge."[6] It was not unti after his discharge had thus been confirmed tha Ramey, to avoid causing further "trouble," left th packing shed (R. 97).

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[6] *Neid* v. *Tassie's Bakery*, 219 Minn. 272, 17 N. W. 2d 357, 358 see also, *Allgood* v. *City of Oskaloosa*, 231 Iowa 197, 1 N. W. 2 211, 212. Compare *N. L. R. B.* v. *American Potash & Chemica Corp.*, 98 F. 2d 488, 493–494 (C. A. 9), certiorari denied 306 U. S 643; *N. L. R. B.* v. *Sartorius*, 140 F. 2d 203, 205 (C. A. 2); *N. L R. B.* v. *Isthmian S. S. Co.*, 126 F. 2d 598 (C. A 2).

Since the Company's action in laying off and then refusing to reinstate Ramey was prompted by its decision to yield to the Union's demand that Ramey be discharged because of his failure to maintain his Union membership in good standing, the Board properly found that its conduct falls within the interdiction of Section 8 (a) (3) of the Act, which proscribes "discrimination in regard to hire or tenure of employment * * * to encourage * * * membership in any labor organization." See, *N. L. R. B.* v. *Radio Officers' Union,* 196 F. 2d 960 (C. A. 2), certiorari granted 21 Law Week 3107; *N. L. R. B.* v. *Newman,* 187 F. 2d 488 (C. A. 2), enforcing 85 NLRB 725; *Union Starch & Refining Company* v. *N. L. R. B.,* 186 F. 2d 1008 (C. A. 7), certiorari denied, 342 U. S. 815; *N. L. R. B.* v. *Guerin,* No. 12994, decided May 14, 1952 (C. A. 9), enforcing without opinion 92 NLRB 1698; *Colonie Fibre Co.* v. *N. L. R. B.,* 163 F. 2d 65 (C. A. 2); *N. L. R. B.* v. *Jarka Corp.,* 198 F. 2d 618 (C. A. 3).

Moreover, the Company cannot escape responsibility for the termination of Ramey's employment even if it were conceded, *arguendo,* both that Ramey's layoff on August 5 was intended to be merely for the remainder of the day rather than until such time as he should settle his difficulty with the Union, and that Hamilton's statement to Ramey at the time of the August 7 work stoppage did not constitute an express discharge by the Company. As stated *supra,* p. 7, this view of the facts of Ramey's discharge was taken by the Trial Examiner, who exonerated the

Company from the unfair labor practices alleged in the complaint on the ground that Ramey's loss of employment was solely attributable to the Union's coercive conduct, and not to the Company (R. 48–50). The Board noted, however, that the examiner's legal conclusion did not follow even from the facts as he interpreted them.[7] For whatever version of the August 7 occurrences is taken, it is clear that Ramey appeared at the packing shed on that morning to make himself available for work, and that his subsequent departure was not voluntary. Accordingly, if Ramey did not leave because he considered that Hamilton had expressly discharged him, he necessarily left "because of the demonstration against him by the * * * Union" (R. 27). The Union's objective, of course, was to compel Ramey either to establish his Union membership in good standing by payment of his dues, or to terminate his employment altogether. The economic coercion which it brought to bear to attain that objective lay in the deprivation of Ramey's ability to work until he had chosen between the alternatives, for the work stoppage

[7] As is clear from the foregoing recital, the Board did not disagree with the Trial Examiner's findings of fact as to the events and utterances relevant to Ramey's loss of employment. The favored position occupied by the Trial Examiner in evaluating questions of credibility with respect to the facts does not of course extend with equal force to his interpretation of those facts. And on questions of law, of course, he occupies no paramount position. *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, 496. Cf. *N. L. R. B.* v. *Eclipse Lumber Co. et al.* (C. A. 9, decided November 12, 1952).

resulted in an effective shutdown of all operations at the packing shed (*supra,* p. 4).

Under these circumstances, Ramey's departure at the very least constituted an enforced resignation.[8] And as the Board found, if this version of the facts be assumed the Company's conduct during the critical events of August 7 constituted an unequivocal adoption of the Union's position in its successful attempt to drive Ramey out of the packing shed, and thereby fastened responsibility on the Company as well as on the Union for Ramey's loss of his job. For in demonstrating to force Ramey to quit his employment, the Union was attempting, in the presence of the Company, to usurp "the normal exercise of the *right of the employer* to select its employees or to discharge them." *N. L. R. B.* v. *Jones & Laughlin Steel Co.,* 301 U. S. 1, 45. (Emphasis added.) In these circumstances, either "it was [the Company's] duty to resist such violent domination of *its right and power to employ,*" or to answer for the consequences of the exercise of that right by the Union. *N. L. R. B.* v. *Goodyear Tire & Rubber Co.,* 129 F. 2d 661, 664 (C. A. 5), certiorari granted 317 U. S. 622, and dismissed 319 U. S. 776 (emphasis added). Thus, it is well established that where union groups, in order

[8] There is, of course, no question but that such a resignation, where the employer is responsible and is prompted by discriminatory motives, constitutes a violation of Section 8 (a) (3) of the Act. *N. L. R. B.* v. *Armour & Co.*, 154 F. 2d 570, 576–577 (C. A. 10), certiorari denied, 329 U. S. 732; *N. L. R. B.* v. *Sartorius*, 140 F. 2d 203, 205 (C. A. 2); *N. L. R. B.* v. *East Texas Motor Co.*, 140 F. 2d 404, 405–406 (C. A. 5); *N. L. R. B.* v. *Baltimore Transit Co.*, 140 F. 2d 51, 56 (C. A. 4), certiorari denied, 321 U. S. 795; *N. L. R. B.* v. *Chicago Apparatus Co.*, 116 F. 2d 753, 759 (C. A. 7).

to end the employment of employees whose activities are hostile to the union, physically evict the latter from the employer's premises, the employer who knowingly fails to take any steps to regain his control over the employment relation and to undo the acts of the usurping union groups adopts such acts as his own.[9]

Similarly, in this case, where an employee was "evicted" from his employment by economic, rather than physical, pressure exerted against him by the Union, it was the duty of foreman Hamilton, who possessed complete authority with respect to employment at the packing shed, "to take effective action to assure Ramey that he would be protected in his right to remain at work" (R. 27). Instead, Hamilton manifested an acquiesence in the Union's purpose, and failed in any manner to assert his authority to control employment when Ramey yielded to the

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[9] See, e. g., *N. L. R. B.* v. *Boswell Co.*, 136 F. 2d 585, 591–592 (C. A. 9); *N. L. R. B.* v. *Weissman Co.*, 170 F. 2d 952, 954 (C. A. 6), certiorari denied, 336 U. S. 972; *N. L. R. B.* v. *Weirton Steel Co.*, 135 F. 2d 494, 495 (C. A. 3); *N. L. R. B.* v. *Goodyear Tire & Rubber Co.*, 129 F. 2d 661, 664 (C. A. 5), certiorari granted 317 U. S. 622, and dismissed 319 U. S. 776; *N. L. R. B.* v. *Hudson Motor Car Co.*, 128 F. 2d 528, 533 (C. A. 6); *N. L. R. B.* v. *Isthmian S. S. Co.*, 126 F. 2d 598, 600 (C. A. 2); *N. L. R. B.* v. *Greenebaum Tanning*, 110 F. 2d 984 (C. A. 7), certiorari denied, 311 U. S. 662.

This consequence flows from the responsibilities that inhere in the employer's authority to control employment. Accordingly, the logic of the Board's conclusion is found in the familiar rationale of the principles of agency, and does not depend, as the Trial Examiner appears to have believed, on an employer's prior "unlawful conduct [which] has incited or encouraged hostility among his employees against one of their own number because of the latter's union affiliation or lack of it * * *" (R. 49).

demonstrators and left the packing shed. The correctness of the conclusion that Hamilton had approved and adopted the Union's position is borne out by Hamilton's subsequent failure to keep his earlier promise to give Ramey a job when work began on Persian melons, even though the latter returned to the packing shed in the hope that he would be given "a chance to go back to work" (R. 101).

Thus, whether the facts in this case are construed to support the conclusion that Hamilton affirmatively discharged Ramey, or that the Company, by its inaction when the Union forced Ramey to quit, relinquished its control over employment to the Union and thereby adopted its actions, the result is the same. In either case, the Company is responsible for the discrimination that caused Ramey the loss of his job, and is, accordingly, guilty of a violation of Section 8 (a) (3) of the Act.

Finally, the conduct of the Company, in effecting Ramey's discriminatory termination from employment, and of the Union, in causing the discrimination, also constitute violations of Section 8 (a) (1) and 8 (b) (1) (A) of the Act, respectively. These sections prohibit an employer (8 (a) (1)) and a union (8 (b) (1) (A)) from restraining or coercing employees in the exercise of their right, under Section 7, "to refrain from * * * join[ing] or assist[ing] labor organizations, * * * and * * * engag-[ing] in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *." Manifestly, the loss of employment tenure

because of a failure to pay Union dues and retain Union membership in good standing, is a patent restraint upon the right, which Ramey is guaranteed by Section 7, not to join and assist the Union and not to participate in any of the Union's affairs. See, *Union Starch & Refining Company* v. *N. L. R. B.*, 186 F. 2d 1008 (C. A. 7), certiorari denied 342 U. S. 815; *N. L. R. B.* v. *Automobile Workers, CIO,* 194 F. 2d 698, 702 (C. A. 7).

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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DECEMBER 1952.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. IV, Secs. 151, *et seq.*), are as follows:

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a

labor organization (not established, maintained, or assisted by any action defined in Section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in Section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his repre-

sentatives for the purposes of collective bargaining or the adjustment of grievances;

(2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

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PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * * if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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PUBLIC LAW 189, 82D CONGRESS

CHAPTER 534, 1ST SESSION

65 Stat. 601

AN ACT TO AMEND THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, AND FOR OTHER PURPOSES

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(b) Subsection (a) (3) of section 8 of said Act is amended by striking out so much of the first sentence as reads "; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:" and inserting in lieu thereof the following: "and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9 (f), (g), (h), and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement:"

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